



the main character, Rocky Balboa, was based on Wepner and the plot of the first movie was inspired by the 1975 fight. (Id. ¶ 15; Def.’s Moving Br. pp. 2, 15.) Wepner frames his legal claims in terms of Stallone’s use of Wepner’s name to promote the Rocky movies and related products for commercial purposes without Wepner’s consent and without compensating him.

Stallone has moved to dismiss the complaint on two grounds. First, he contends that this Court lacks personal jurisdiction over him because he has insufficient minimal contacts with New Jersey. Alternatively, Stallone asserts that (1) Wepner’s misappropriation claim must be dismissed because the Rocky movies are protected artistic expression under the First Amendment and their promotion is a necessary adjunct to that expression; (2) the unjust enrichment claim fails due to the absence of a necessary element of that claim – that plaintiff expected remuneration when the benefit was conferred; (3) the “detrimental reliance” claim, which defendant has characterized as a promissory estoppel claim, fails because Wepner cannot identify any enforceable promises made by Stallone; and (4) the six year statute of limitations bars any claims that assert conduct occurring before November 12, 1997.

## **DISCUSSION**

### ***Personal Jurisdiction***

The Court has subject matter jurisdiction based on diversity – Wepner is a resident of New Jersey and Stallone is a resident of California. As such, New Jersey law applies to the issue of personal jurisdiction. *See* Provident Nat’l Bank v. Cal. Fed. Sav. & Loan Ass’n, 819 F.2d 434, 436 (3d Cir. 1987). New Jersey law views personal jurisdiction broadly, and deems service upon a defendant as sufficient to create personal jurisdiction to the “utmost limits permitted by the United States Constitution.” Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). The analysis

of whether due process is satisfied is two-pronged: first, does a defendant have “minimum contacts” with the state; and second, are those contacts sufficient to comport with “traditional notions of fair play and substantial justice.” Division of Youth & Family Serv. v. M.Y.J.P., 360 N.J. Super. 426, 456 (App. Div. 2003). In applying the test, the Court distinguishes between two types of personal jurisdiction: specific and general.

Specific jurisdiction is established when a defendant's acts within the forum-state give rise to the cause of action. In contrast, when the defendant's presence in the state is unrelated to the subject matter of the lawsuit, general jurisdiction may be obtained based on the defendant's ‘continuous and substantial’ contacts with the forum.

Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 452 (App. Div. 1998) (internal citations omitted).

General jurisdiction subjects the defendant to suit on virtually any claim, even if unrelated to the defendant's contacts with the forum, but is unavailable unless the defendant's activities in the forum state can be characterized as ‘continuous and systematic’ contacts. . . . In the context of specific jurisdiction, the minimum contacts inquiry must focus on ‘the relationship among the defendant, the forum, and the litigation.’ The ‘minimum contacts’ requirement is satisfied so long as the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff.

Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322-23 (1989); *accord* Waste Management, Inc. v. Admiral Ins. Co., 138 N.J. 106, 119-20 (1994).

Wepner, who carries the burden here, argues that the following facts establish Stallone's requisite minimum contacts with New Jersey: (1) Stallone's movies, from which he receives compensation, are shown and generate revenue in New Jersey; (2) Stallone's website permits users in New Jersey to order merchandise that is shipped into New Jersey, from which he also derives income; and (3) until March of 2000, Stallone was a significant investor in and promoter of the chain of Planet Hollywood restaurants, one of which is located in Atlantic City, New

Jersey.

Stallone responds that he does not control the Stallone website and is not responsible for the “*actual* sales, shipping and contact with purchasers,” but he does not refute plaintiff’s contention that he derives income from the sales. (Def.’s Reply Br. p. 1.) Stallone also contends he is a “mere shareholder,” not a corporate officer, and relies on case law holding that corporate agents and employees are shielded from an exercise of personal jurisdiction arising from their corporate functions.

The crux of plaintiff’s assertion of personal jurisdiction is that Stallone, whether through movies, merchandising, or restauranteuring, receives income from enterprises operating within the State of New Jersey. Stallone’s position that he did not physically do anything in New Jersey to earn the revenues from his movies or restaurant, and that he does not receive “direct monetary benefit from the operation of the [web]site,” misses the mark.. The jurisdictional question is not whether money leaves the hands of someone in New Jersey and goes “directly” to the defendant, but whether defendant has “minimum contacts” with the state that are “continuous and systematic.” Wepner has sufficiently established that Stallone has had continuous and systematic minimum contacts with New Jersey. Contrary to Stallone’s assertions that his contacts are “random and fortuitous,” it is reasonable to infer from the facts pled in the complaint that his money making ventures in New Jersey are purposeful and profitable. As such, traditional notions of fair play and substantial justice are not offended by his having to appear and defend this case in the District of New Jersey.

Because this Court has general personal jurisdiction over Stallone, it is unnecessary to address whether the Court also has specific personal jurisdiction over him.

### ***Failure to State a Claim***

When a party seeks dismissal for failure to state a claim, this Court “must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them.” Schuykill Energy Resources, Inc. v. Penn. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997) (citations omitted). Dismissal is only appropriate when the allegations of the complaint are viewed from this perspective and it is still “clear that no relief could be granted under any set of facts that could be proven consistent with the allegations.” Alexander v. Whitman, 114 F.3d 1392, 1397 (3d Cir. 1997).

#### ***I. First Count - Misappropriation of Name and/or Likeness Litigation***

New Jersey law recognizes four types of privacy actions, one of which is an action for misappropriation of the name or likeness of a public person, sometimes known as a violation of the right of publicity.<sup>1</sup> Faber v. Condecor, Inc., 195 N.J. Super. 81, 86 (App. Div. 1984). “The foundation for this tort is recognition that a person has an interest in their name or likeness ‘in the nature of a property right.’” Castro v. NYT Television, 370 N.J. Super. 282, 297 (App. Div. 2004) (citation omitted); accord McFarland v. Miller, 14 F.3d 912, 921 (3d Cir. 1994). Not all uses of a person’s identity violate this proprietary interest – only those uses where a defendant acts to take advantage of the value of that property right.

The value of the plaintiff’s name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities . . . . It is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.

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<sup>1</sup> Although the complaint refers once to misappropriation of Wepner’s likeness, the factual allegations of the complaint refer to use of his name, and the parties appear to agree that only the use of Wepner’s name is at issue.

Faber, 195 N.J. Super. at 87 (*quoting* Restatement of Torts § 652C, p. 382-83).

The most common violation of the right of publicity comes in the form of “the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product.” Castro, 370 N.J. Super. at 297 (quotation omitted). The critical consideration is “the association between celebrity and product.” McFarland, 14 F.3d at 919. Misappropriation occurs when the use of the name “functions primarily as a means of commercial exploitation,” and not as a means of contributing information or participating in debate as a “free expression of creative talents which contributes to society’s cultural enrichment.” In re Estate of Presley, 513 F.Supp. 1339, 1356 (D.N.J. 1981) (Brotman, J.).

Stallone contends that the misappropriation claims fails because he has a First Amendment right to make truthful statements concerning Wepner’s inspirational role in the creation of the Rocky movies. He argues that it follows that he also has a First Amendment right to state for promotional purposes that Wepner’s life was an inspiration for the Rocky Balboa character. (Def.’s Moving Br. p. 17. Stallone asserts that there are no New Jersey cases specifically addressing the issue presented in this case and that this Court should look to non-binding authority, citing cases out of New York, California and the Fifth Circuit, which analyze, among other things, New York’s statutory law. In opposition, plaintiff cites to numerous New Jersey cases in support of his contention that the complaint makes sufficient allegations under New Jersey law to survive a motion to dismiss.

The Court agrees with Wepner’s contentions, finding that the complaint does not assert that Stallone is barred from acknowledging publicly that he used plaintiff as an inspiration to write the Rocky movies. Rather, Wepner is claiming that the use of his name to promote the

Rocky movies is purely commercial, intended to increase sales of the movies and products related to them. *See* Compl. ¶ 3 (stating that defendant “uses the name of Wepner for marketing and commercial purposes”); *id.* ¶ 21 (stating that defendant uses “the name of Wepner in the promotion of the Rocky [Movies]”); *id.* ¶ 22 (stating that defendant “seizes upon the opportunity to use Wepner’s name . . . , thus enhancing sales”); *id.* ¶ 25 (stating that defendant “has used Wepner’s name . . . in promotional pieces . . . in order to stoke the commercial interests in further products”); *id.* ¶ 26 (stating that “Wepner’s name is currently intricately linked to various marketing materials”) *id.* ¶ 28 (stating that the “use of Wepner’s name . . . draws valuable marketing appeal”). Wepner also points to specific incidents, which must be accepted as true, that support his claim. He alleges that his name is “prominently displayed in various media, including defendant’s official website, and in materials used to market the sales of videotapes and digital video discs (DVD’s).” He alleges too that his name is found “in the print materials found in the packaging of the disc.” (*Id.* ¶¶ 26-27.)

The Court finds that Wepner has sufficiently pled Stallone’s use of Wepner’s name for trade purposes, and denies the motion to dismiss the First Count of the complaint.

## ***II. Second Count - Unjust Enrichment***

Stallone argues that the unjust enrichment count of the complaint fails for lack of a reasonable expectation Wepner would be compensated. Wepner responds that his misappropriation claim goes hand-in-hand with his unjust enrichment claim, and where a claim can be made under one cause of action, a claim also lies under the other.

Wepner’s argument is not supported by New Jersey law. In Castro v. NYT Television, 370 N.J. Super. 282, 299 (App. Div. 2004), the Appellate Division noted that an unjust

enrichment claim is founded in the law of contract, while a misappropriation claim is founded in the law of tort, and further held that both claims were intended to address the same harm. Only where a plaintiff could point to an “express agreement” that would allow him to “reasonably expect” payment, could that plaintiff bring both a misappropriation claim and unjust enrichment claims. Id. Otherwise, plaintiff was limited to its misappropriation claim in order to recover for “the unjust enrichment that would result from uncompensated use of the name or likeness of another person.” Id. In Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108 (App. Div. 1966), the court stated that unjust enrichment should be asserted “with caution”; that as a cause of action it requires “some direction relationship between the parties,” id. at 109, and was developed “to provide a remedy where none existed.” Id. at 110. In F. Bender, Inc. v. Jos. L. Muscarelle, Inc., 304 N.J. Super. 282, 285-86 (App. Div. 1997), the Appellate Division dismissed the plaintiff’s claim for unjust enrichment, holding a claim based on that theory is appropriately made only where no other remedy exists.

From the facts pled here, Stallone correctly notes that Wepner does not allege the existence of an express agreement from which he could expect compensation for the use of his name in the marketing and promotion of the Rocky movies and merchandise. An examination of the complaint reveals no relationship between the promises alleged and any expectation of payment for the use of Wepner’s name or his likeness for marketing purposes. In Kopin v. Orange Prod., Inc., 297 N.J. Super. 353, 366 (App. Div. 1997), the court held that the expectation of remuneration must relate to the benefit conferred, at the time the benefit was conferred. In this complaint, Wepner alleges that Stallone promised him a small role in the Rocky movies; that “there will be something” coming from the Rocky movies to plaintiff; and that Stallone and

Wepner would work together on an unidentified project. (Compl. ¶¶ 30-32.) These promises do not relate to the use of Wepner's name for marketing purposes. Wepner makes only one allegation supporting his expectation of compensation, stating in Paragraph 34 that he was promised "some sort of compensation." This reference fails to indicate what benefit to Stallone he would be compensated for, and is bereft of factual support.

In short, no matter how favorably viewed, the facts pled in the complaint fail to establish that there was an agreement relating to the use of plaintiff's name to market the Rocky movies, and fail to support the allegation that Wepner expected payment for the use of his name in marketing. Without these elements to distinguish plaintiff's unjust enrichment claim from his misappropriation claim, under New Jersey case law Wepner is limited to the latter claim to address the harm alleged, and his unjust enrichment claim will be dismissed.

### ***III. Third Count - Promissory Estoppel***

Wepner's "detrimental reliance" claim alleges that Stallone made promises to him on which he relied, and that he has suffered damages as a result. (Compl. ¶¶ 46-49.) Stallone has recharacterized this claim as one of promissory estoppel. Wepner does not oppose consideration of his claim in that context, and in fact does not oppose Stallone's legal arguments supporting dismissal of the third count.

"There are four elements to the doctrine of promissory estoppel: 1) a clear and definite promise, 2) made with the expectation that the promisee will rely upon it, 3) reasonable reliance upon the promise, 4) which results in definite and substantial detriment." Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 499 (App. Div. 2003). Stallone argues that Wepner has failed to sufficiently plead any of these elements. Wepner alleges that (1) Stallone invited him to read

for a part in the second Rocky movie, but that the part was cut from the film; (2) Stallone indicated that “there will be something in this for you;” and (3) Stallone stated that he was “working on something” for Wepner and that they would “work on a project together.” (Compl. ¶ 30-32.) Even with the benefit of all favorable inferences to be drawn from these statements, they do not allege a “clear and definite promise” that would be enforceable on a claim of promissory estoppel.

Moreover, to satisfy the second element of the claim, Stallone’s promises must “relate to an intended abandonment of an existing right,” or be made with the intent to induce Wepner to “act or to forbear.” Royal Assoc. v. Concannon, 200 N.J. Super. 84, 91 (App. Div. 1985). Wepner has not asserted that he held an existing right that Stallone intended him to relinquish or that Stallone intended to prompt Wepner to take any particular action.

On the remaining elements, Wepner pleads no facts to establish reliance, reasonable or otherwise. The complaint states in conclusory terms that “Wepner has relied on defendant’s numerous and repeated promises of some sort of compensation”(Compl. ¶ 34), but alleges nothing to support this conclusion, such as lost income opportunities or financial commitments that he made anticipating payment. *See generally* Shebar v. Sanyo Bus. Sys., Inc., 111 N.J. 276, 289 (1988) (finding plaintiff demonstrated reliance “by forgoing [a] job opportunity”); Bengis v. Bengis, 227 N.J. Super. 351, 360 (App. Div. 1987) (recognizing indicators of reliance include whether a party “gave up a lucrative profession or undertook new and financially burdensome responsibilities”). Similarly, the complaint makes a conclusory allegation that Wepner “reasonably relied on defendant’s promises of compensation” without factual support that demonstrate reasonableness.

Finally, Wepner fails to plead “definite and substantial detriment.” The complaint alleges that “plaintiff has suffered damages in the form of profits defendant has earned from increased sales of products associated with the Rocky [movies],” but these purported damages have no relationship to the alleged promises. (Compl. ¶ 49.) Even if Stallone had promised Wepner a part in one of the Rocky movies, or that he and Wepner would work together on a different project, the complaint fails to link these promises to product sales.

As his lack of response suggests, and the foregoing analysis of the deficiencies in the complaint demonstrates, Wepner has failed to state a claim for promissory estoppel.

#### ***IV. Statute of Limitations***

The final issue is whether the surviving substantive claim for misappropriation fails on statute of limitation grounds. Wepner argues that his complaint sufficiently alleges that ongoing and continuous misappropriation has occurred within the past six years and as such, is not time-barred.

The Court agrees. The opening paragraph of the complaint reads:

This action arises out of the continuous and current violation of Wepner’s rights of publicity by Defendant Sylvester Stallone . . . . Throughout the years including to date, Stallone has used plaintiff’s name to promote the motion picture Rocky, its four (4) sequels, and, among other things, products associated with the Rocky line of movies.

(Compl. ¶ 1.) The rest of the complaint is replete with allegations of continuing tortious conduct. *See id.* ¶ 2 (stating that Stallone “continues to use, the name of Chuck Wepner”); *id.* ¶ 19 (stating “the use of plaintiff’s name in connection with such products, continues to this day”); *id.* ¶ 21 (stating that “Defendant has used, and continues to use, the name of Wepner”); *id.* ¶ 24 (stating that “Defendant has capitalized, and continues to capitalize, on the fact that using Wepner’s

name” helps sell Rocky products); id. ¶ 26 (stating that “Defendant’s unauthorized use of Wepner’s name in this vain continues to this very day”); id. ¶ 36 (stating that “Defendant has used, and continues to use the name and likeness of plaintiff in the promotion of the Rocky [movies]”). Wepner backs up these allegation by citing to the use of his name on Stallone’s official website and inclusion of his name in the materials that accompany the version of the Rocky DVD’s currently on sale. (Id. ¶ 26.) These allegations easily establish that Stallone’s limitations challenge is without merit.

### CONCLUSION

For the foregoing reasons, defendant’s motion to dismiss for lack of personal jurisdiction is **denied**. His motion to dismiss for failure to state a claim is **denied** as to the First Count of the complaint, and **granted** as to the Second and Third Count. An appropriate Order will be entered.

Date: September 27, 2004

s/ Katharine S. Hayden

Katharine S. Hayden, U.S.D.J.